In the Supreme Court of the United States

OCTOBER TERM, 1959.

No. 360.

UNITED STEELWORKERS OF AMERICA,

Petitioner,

versus

AMERICAN MANUFACTURING COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

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PRELIMINARY STATEMENT.

In this Brief Respondent will limit itself exclusively to Case No. 360. Petitioner's Brief undertakes to treat this in consolidation with Numbers 443 and 538. Although for the most part, the questions in those cases appear to be entirely different from those presented in Number 360, Respondent is not sufficiently familiar with the record and issues in the other cases to undertake any discussion of them in this Brief. For brevity and clarity the Petitioner will at times be referred to as "the Union," and this Respondent as "the Company," or as "Management."

OPINIONS BELOW.

Although in the American Manufacturing Company case the opinion of the District Court for the Eastern District of Tennessee is unreported, the full text of that opinion appears in the record here before this Court. (Am. R. 39).[1] The opinion of the Court of Appeals for the Sixth Circuit has also been included in the Transcript of the Record. (Am. R. 64.)

QUESTIONS PRESENTED FOR REVIEW.

1. When a party brings an action in the District Court under Section 301(a) of the Labor-Management Relations Act to compel arbitration, is the Court merely a robot to pass with mechanical, thoughtless uniformity all alleged grievances to arbitrators for decision; or did Congress intrust to the Court, rather than to arbitrators, the decision as to arbitrability, where the parties did not agree in the contract that the decision as to arbitrability would be left to the arbitrators?

2. In determining the question of arbitrability, is the Court required to abandon all basic judicial concepts, and to use its extraordinary injunctive powers to compel arbitration of alleged grievances which are patently frivolous or baseless?

3. After a party has set in motion the Summary Judgment procedure authorized by the Federal Rules of Civil Procedure, and has so called on the Court to determine the issues pursuant to that part of the Rules, will that party be permitted to renounce and cast aside all the essential requirements of the Federal Rules so invoked, on the

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[1] References to the record in No. 360 will follow the same indication system adopted by the Petitioner. "Am. R." will refer to the record in Cause No. 360 and will be followed by the page number in the record printed by the Clerk of this Court.

theory that they do not apply to an action brought under Section 301(a) of the Labor-Management Relations Act?

4. In an action before the Court under said Section 301(a) seeking to compel arbitration of an alleged grievance as to re-employment; where a complainant and defendant in turn move for summary judgment; and it is shown that the contracting parties had agreed that re-employment seniority rights would be controlled by fitness, that is by the ability and efficiency of the former employee; where the entire record showed that the party seeking such re-employment was not able to lift the weights and do the stooping and bending required in such work; that the Respondent was a small manufacturing company not having any jobs which disabled men could fill; and that the party seeking re-employment was some twenty-five (25%) percent less able and efficient than the able-bodied men required in the employer's work; and further that the former employee had claimed, received and accepted Workmen's Compensation benefits in a Court action based upon twenty-five (25%) percent permanent disability, obtaining this disability award just seven days before he sought to return to his regular job; did the Court properly hold that the Union could not compel arbitration and that this alleged grievance was baseless?

5. Can a Union, acting for a Company's former employee, contend through a proceeding to compel arbitration that his ability and efficiency are equal to that of other employees as contemplated by the Seniority provisions of the Agreement, when he has very recently contended in Court that he is permanently disabled to the extent of twenty-five (25%) percent of his whole body, and the Company, relying on that contention, has settled on him a substantial sum of money, which he sought and accepted to recompense him for that permanent disability?

SUPPLEMENTAL STATEMENT OF THE CASE.

The Workmen's Compensation award demanded by Sparks, under the provisions of the Tennessee law, approved by the Court, and paid to Sparks, was in the lump sum amount of Three Thousand, Six Dollars, Twenty-four Cents ($3,006.24). (Am. R. 31.) This was in addition to substantial medical and hospital benefits. Although the Court order entered September 9, 1957 (Am. R. 31), did not specify the percentage of disability, it can be verified by mathematical computation from the provisions of the Tennessee Workmen's Compensation Act, that this award was made and approved on the basis of a twenty-five (25%) permanent disability. (Tennessee Code Annotated, 50-901, et seq.) That this compensation award was in payment for a claimed "twenty-five (25%) percent permanent-partial disability" is further verified by the record in the Summary Judgment proceeding in the District Court where W. Neil Thomas, Jr., Esq. in his affidavit, showed that the amount paid was based on the representation made by James D. Sparks and his physician that Sparks had a twenty-five (25%) percent permanent-partial disability. (Am. R. 54.)

The Record discloses a sequence of events as follows:

August 14, 1957—Dr. Warren Kimsey reports Sparks' permanent disability will remain at about twenty-five percent. (Am. R. 54.)

August 14, 1957—Dr. Warren Kimsey advises defendant's Plant Manager—James Sparks "cannot lift over thirty pounds of weight." (Am. R. 44.)

August 28, 1957—Dr. George W. Shelton finds James Sparks' permanent disability "to be twenty-five percent of the body as a whole for his particular type of work." (Am. R. 48.)

September 9, 1957—Sparks in court proceeding against employer obtains lump sum settlement based on twenty-five percent permanent disability of the body as a whole. (Am. R. 31 and Am. R. 54.)

September 16, 1957—Dr. Warren Kimsey signs statement To Whom it May Concern that James Sparks is now able to return to his former duties without danger to himself or to others. (Am. R. 39.)

September 16, 1957—(a Monday) Sparks seeks to return to work at his regular job, but was released or discharged. (Am. R. 20.)

September 23, 1957—Union files grievance report alleging violation of Seniority provisions of Agreement. (Am. R. 20.)

October 30, 1957—Attorneys for Company in the Workmen's Compensation Case request of James Sparks and his attorney a conference "to ascertain whether or not the premise upon which our settlement was based was well founded." (Am. R. 56, 57.) To which request no answer was received. (Am. R. 54.)

November 14, 1957—Dr. George W. Shelton (examining by consent of both parties) finds no change in twenty-five percent permanent disability of the body as a whole, and states "it is my opinion that he should not be placed on work requiring heavy lifting, or prolonged stooping or bending." (Am. R. 47, 48.)

December 19, 1957—Complainant filed in U. S. District Court seeking to compel arbitration of Sparks' insistence that he be returned to his regular job. (Am. R. 2.)

February 18, 1958—Motion for summary judgment filed by Union. (Am. 32.)

February 25, 1958—Affidavit of R. W. Goddard "Staff Representative" of Union filed in support of motion for summary judgment. (Am. R. 33.)

March 31, 1958—Supplemental affidavit of Mr. Goddard filed exhibiting copy of one sentence report of Dr. Kimsey dated September 16, 1957; no claim or insistence being made as to any error in earlier medical findings, or as to any subsequent recovery from twenty-five percent permanent disability of the body. (Am. R. 38-39.)

April 7, 1958—The Company requests summary judgment in its behalf. (Am. R. 56.)

Article II of the Collective Bargaining Agreement provided in part as follows:

> "The management of the works, the direction of the working force, plant layout and routine of work, including the right to hire, suspend, transfer, discharge or otherwise discipline any employee for cause, such cause being: infraction of Company rules, inefficiency, insubordination, contagious disease harmful to others, and any other ground or reason that would tend to reduce or impair the efficiency of plant operation * * * is reserved to the Company." (Am. R. 6.)

That same Article II further provides:

> "If any discharged or disciplined employee contends that he was not guilty of the cause given, he may question his discharge or disciplining by filing written protest within three (3) working days from the date of his discharge or discipline. Unless such written protest is filed, all questions of the discharge or disciplining will be considered waived." (Am. R. 6.)

No such protest was filed as required by this Article. Instead, the Union chose to approach the matter indirectly by demanding that he be re-employed at his regular job under Article XIV. (Am. R. 20, Am. R. 11.)

The Company's business is a small one, and the "regular job" to which the Union sought to have Sparks

re-employed demands that lifting and twisting and heavy work described by the Plant Manager, Mr. W. G. Alexander (Am. R. 43-46), and also described in part by James D. Sparks in his Amended Petition for Workmen's Compensation benefits. (Am. R. 28.)

The personal physician attending James D. Sparks, had notified the Company's Manager, Mr. Alexander, on August 14, 1957, that Sparks "cannot lift over thirty pounds of weight" (Am. R. 44), and Dr. George W. Shelton, examining by agreement of both parties, on November, 1957, expressed the opinion that Sparks should not be placed on work requiring heavy lifting or prolonged stooping or bending. (Am. R. 45.) The Company does not have any light jobs and could not provide James D. Sparks with any work where he would not be required to bend and stoop and lift and to handle weights totaling more than thirty pounds. (Am. R. 46.)

It was important, both to the Company and to its employees, that men working in this department among vats and tanks containing acid and chemicals must be able-bodied and efficient. (Am. R. 45-46.) Also see photographs reproduced. (Am. R. 49-52.)

Both the District Court and the Court of Appeals concurred in finding that the alleged grievance here presented by the Union was not an arbitrable one as a matter of law, and that the defendant Company's motion for a summary judgment should be granted (Am. R. 42) and the action dismissed. (Am. R. 67, 70.)

ARGUMENT.

I.

THE SUMMARY PROCEDURE PROVIDED BY THE FEDERAL RULES OF CIVIL PROCEDURE IS APPLICABLE TO ACTIONS BROUGHT UNDER SECTION 301(a) OF THE LABOR-MANAGEMENT RELATIONS ACT.

The Federal Rules of Civil Procedure, and specifically Rule 56, provide for Summary Judgment.

In the discussion following Rule 56, found in *Moore's Federal Rules and Official Forms* (1956 Edition), page 284, it is said:

> "It cannot be stressed too strongly that there is no civil action or issue that is immune to summary adjudication; and, when general principles have warranted, summary judgment has been rendered in all types of civil action and on all kinds of issues." *Moore's Federal Rules and Official Forms* (1956 Edition), page 284.

That the Summary Judgment procedure is properly usable in labor relations cases is amply recognized in the decisions of our Courts.

In *Elgin, J. and E. Railway Company v. Burley*, 325 U. S. 711, there was before this Court a question concerning the authority of a collective bargaining representative, affecting the operation of the Railway Labor Act. The District Court rendered summary judgment for the carrier. As to the District Court's judgment, Mr. Justice Rutledge, in the opinion, said that it "must be taken to have held that, upon the pleadings and the affidavits, no genuine issue of material fact was presented." The Court then specifically cited the Federal Rules of Civil Procedure, Rule 56(c), 28 U. S. C. A. following Section 723(c). *Elgin, J. and E. Ry. Co. v. Burley*, 325 U. S. 711, 719.

One of the cases cited with approval by the Court in *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448 at page 451, is a decision rendered by Judge Wyzanski on a motion for summary judgment. From the opinion in that earlier case it appears that "each party moved for summary judgment." *Textile Workers Union v. American Thread Co.*, 113 Fed. Supp. 137, 139.

When either or both parties ask for a summary judgment, ample opportunity is provided under the Rule for filing of affidavits and evidence of material facts.

II.

THE CONCEPTS OF JUSTICE AND THE MAXIMS DEVELOPED BY OUR COURTS THROUGH THE YEARS, ARE VALID GUIDES IN FEDERAL LABOR LAW.

Our Courts have been called on to fashion a body of substantive law to be applied in suits under Section 301(a). We humbly suggest that in fashioning such a body of applicable Federal Law, the Courts may well include as foundation principles, those maxims long found to be basic in American and English law.

This is a field of equity jurisprudence—of interpretation of right and wrong between groups of human beings—one group composing "Labor," the other making up "Management." It seems fitting that the venerable maxims so long accepted and followed in undertaking to fairly determine differences between man and man, should not now be discarded merely because the differences arise between two groups of individuals. We shall not undertake to include all applicable maxims. A few, we believe, will be illustrative:

A. "He who comes into equity must come with clean hands."

This statement is so well known that no citation is needed. However, it is quoted and to some extent expounded in *Gibson's Suits in Chancery* (Fifth Edition 1955), Section 51, page 63.

The Union member for whose benefit this action was originally filed, James Sparks, was on October 30, 1957, requested in writing by Attorneys Folts, Bishop & Thomas, to explain his reversal of position as to disability. In that letter and by copy to his attorney, a conference was requested in order that any explanation might be made. (Am. R. 55, 56.) "No answer or acknowledgment was received either from James D. Sparks or from his attorney." (Am. R. 54.)

Likewise, the petitioner Union had the full opportunity in the Summary Judgment proceedings to file an affidavit of Sparks himself, and to bring in medical reports to explain how James D. Sparks in so short a time could have recovered from that twenty-five (25%) percent permanent disability which he previously had claimed and which the doctors had found. By its silence and its refusal and failure to explain or modify, the petitioner in effect, admitted the truth of the facts presented by the respondent Company pursuant to the provisions of the Summary Judgment Rule of Federal Civil Procedure. Only a prima facie showing by or for James D. Sparks was necessary. If James D. Sparks was not still twenty-five (25%) percent permanently disabled, surely he could have brought in competent evidence.

When the person earlier claiming to be and found to be permanently disabled chooses not to attempt any explanation, a later claim made by or in his behalf that his ability and efficiency has now become equal to those of

the able-bodied laborers in the department where he formerly worked, is properly found to have no basis in fact before the Court. The undisputed record shows that anyone working in that department would have to be able-bodied, doing work requiring bending, stooping and lifting under the circumstances and in the surroundings shown by the photographic exhibits. (Am. R. 49-52.) Such a claim, unsupported by any evidence of probative value is patently frivolous and baseless. Time and energies of parties and of arbitrators should not be dissipated on such matters, where in the preliminary hearing (Summary Judgment here first demanded by the Union), no evidence of probative value to support the alleged grievance was produced by the complaining party. (Am. R. 70.)

B. "He is not to be heard who alleges things contradictory to each other."

This is an elementary rule of logic.

Also, it is one of the maxims found in *Broom's Legal Maxims* (Eighth American Edition 1882) at page 168.

On September 9, 1957, James D. Sparks claimed to be twenty-five (25%) percent permanently disabled and collected more than Three Thousand ($3,000.00) Dollars on that basis. (Am. R. 31, Am. R. 54.) Two weeks later (Am. R. 20), through the Union, he sought to be re-employed, claiming no longer to be disabled, but now claiming that he was fully able to do the very work that he and his doctor had claimed he could never do.

However, all the medical proof submitted in the Summary Judgment proceedings refuted the Sparks claim. It is true that Dr. Kimsey, one week after the disability hearing, said Sparks was able to return to his former duties. (Am. R. 39.) However, it is significant that this statement, dated September 16, 1957, was filed by the

Union representative on March 31, 1958 (Am. R. 38), after the Petitioner had full knowledge of the Company's answer, filed January 23, 1958 (Am. R. 20), in which Dr. Kimsey's adverse report of August 14, 1957, was quoted in full. (Am. R. 22.) In that earlier report, Dr. Kimsey's closing sentence was, "I also believe that his partial permanent disability will remain at about 25 percent." (Am. R. 22.) The Petitioner chose not to undertake any clarification or explanation. No explanation or modification by Dr. Kimsey has been offered. Nowhere has James D. Sparks himself either averred or testified that he could do the work necessary in this "regular job" to which the Union sought to have him re-employed.

As Judge Miller said in the Court of Appeals opinion, this evidence is "so lacking in probative value" as to "compel the conclusion that the so-called claim or grievance is a frivolous, patently baseless one, not subject to arbitration." (Am. R. 70.)

C. "Equity enforces what good reason and good conscience requires."

As to this maxim the writers of one treatise on the jurisprudence of equity have said:

> "Conscience itself might make too refined or too unstable a standard for the determination of human conduct in the Courts; and reason of itself might give too wide a range for sharp practices in matters of trade, or other dealings. Indeed, conscience without reason might degenerate into fanaticism, or gross eccentricity; and, on the other hand, reason without conscience might become trickery, or even downright knavery. Hence, in the administration of justice, conscience must be conformed to reason and thus become good conscience, and reason must be conformed to

conscience and thus become good reason; and whatever good conscience and good reason unite in approving is the nearest approach to perfect justice man is able to attain."—*Gibson's Suits in Chancery* (Fifth Edition) Vol. 1, Section 67, page 79, and to the same effect see *Lube's Equity Pleading* 17, 286 and *Pomeroy's Equity Jurisprudence*, Sections 55-57.

III.

THE DETERMINATION OF ARBITRABILITY IS FOR THE COURTS UNLESS THE AGREEMENT OTHERWISE PROVIDES.

Labor and management are two very important segments of our national life. Each has developed and grown in stature and in understanding in recent years. Their agreements, for the most part, are prepared by trained legal counsel. When an alleged grievance is claimed, its arbitrability should be determined by Judges trained in the law and not by laymen. Section 301 strongly implies the Congressional belief in judicial competence. It is the Courts who are called upon in the *Lincoln Mills* case to fashion the body of Federal Law to be applied in suits under Section 301 (a). Surely it was not the intent or purpose of the Labor-Management Act to withdraw from our Courts all judicial responsibility. Surely it was not meant that a petitioner by merely using the word "grievance" could automatically set in motion arbitration proceedings regardless of the reality of the alleged grievance. It is not conceivable that Congress purposed in the Labor-Management Act, to make of our Court system a mere dumb waiter to convey an alleged grievance, regardless of its evident baseless nature, to an arbitrator. At this time the lawyers and Courts of this land are engaged in an unusual effort to explain to the public of our country, and to the world, the important role of law in national and in inter-

national problems. To make of a Court a mere robot to mechanically transfer to arbitrators for determination, all alleged grievances, would be to emasculate the time honored functions of a Court to determine whether a justiciable issue has actually been presented.

The Labor-Management Act did not say that suits for violation of contracts between employee and employer should by-pass the Courts, or be acted on by administrative agencies, or that the issues should be determined solely by arbitrators. No—these matters must be brought in the District Court! Why? In order that the Court might exercise its valid functions! There is no need for such suits to be filed in the District Court, if every alleged grievance, no matter how unfounded and baseless it clearly appears to be, must be mechanically channeled by the Court to an arbitrator.

There is an old saying that calling an onion a rose does not make it one. And to this might be added, that it does not require the services of an arbitrator to tell the difference.

At some seven places in its Brief, the Petitioner has quoted from Professor Archibald Cox's article "Reflections on Labor Arbitration" found in 72 *Harvard Law Review* (1959), pages 1482 through 1518. It is therefore impressive, that at page 1509 of this *Law Review* article, Professor Cox says:

> "Nevertheless, I am persuaded that the conventional arbitration clause is not an agreement which allows an arbitrator to interpret its meaning, thereby determining his own jurisdiction."—Cox "Reflections on Labor Arbitration," 72 *Harv. L. Rev.* 1482-1509.

In the preceding paragraph it is clear that "the conventional arbitration clause" to which he refers is of the same type as is now before this Court in this case.

Judge Magruder, Chief Judge of the First Circuit, has, in several opinions, expressed the sound reasoning by which he arrived at the opinion that,

> "Arbitrability is a question which the District Court must pass on in the first instance."—*Local 205, etc. v. General Electric Co.*, 233 F. 2d 85, 101.

In his opinion in the later decision in 1957, subsequent to the *Lincoln Mills* case, the legal reasoning is set forth, the First Circuit again held that the Court must determine as a matter of law whether an alleged grievance is arbitrable. In that opinion the Court said:

> "However, that may be, and focusing our attention exclusively on the language of Section 301 (a), it is obvious that the plaintiff, in a suit under Section 301 (a) has the burden of establishing that it is bringing a suit for appropriate relief, legal or equitable, for violation of a term of a collective bargaining agreement; and that therefore the District Court, before undertaking to decree specific performance of a contract for arbitration, must necessarily first determine, as a matter of law, whether the alleged refusal to arbitrate is a violation of any term in the collective bargaining agreement."—*Local No. 149, etc. v. General Electric Co.*, 250 F. 2d 922, 929, 930.

In the later decision in the First Circuit in the case of *New Bedford Defense Products Division v. Local 1113 U. A. W.*, 258 F. 2d 522, 526, that Court again held that the District Court must determine as a preliminary matter the question of arbitrability.

Two quotations from an opinion of the Second Circuit also subsequent to the *Lincoln Mills* opinion will, we believe, be of aid to the Court here. In that opinion, Judge Waterman said:

> "To make out a case for arbitration, Sperry's alleged breach must be 'put in issue by facts, as dis-

tinguished from unsupported charges.' "—*Engineers Association v. Sperry Gyroscope Co., etc.*, 251 F. 2d 133, 137.

And then Judge Waterman goes on to show so clearly that a petitioner presenting an alleged grievance has only the requirement to make out a *prima facie* case. In that opinion it is stated:

> "Determination of arbitrability only requires that the moving party produce evidence which tends to establish his claim."—*Engineers Association v. Sperry Gyroscope Co., etc.*, 251 F. 2d 133, 137.

IV.

ARBITRATION SHOULD BE DENIED WHERE THE ALLEGED CLAIM OR GRIEVANCE IS FRIVOLOUS OR PATENTLY BASELESS.

In a 1959 decision, Judge Murray of the Montana District Court held that "a frivolous or patently baseless claim should not be ordered to arbitration," but in the case immediately before him he held that the matter was not of that type and that arbitration should proceed.—*Butte Miners Union No. 1 v. Anaconda Company*, 159 F. Supp. 431 at page 436.

The judgment of the District Court in that case was affirmed for the reasons and upon the grounds set forth in the opinion of the District Court. *Anaconda Company v. Butte Miners Union*, 267 F. 2d 940.

In *New Bedford Defense Products Division v. Local No. 1113 U. A. W.*, 258 F. 2d 522 (1st Cir. 1958), Judge Magruder, in the course of the opinion, specifically refers to, and in effect incorporates the reasoning of the earlier decision of that same Circuit (*Local 205, etc. v. General Electric Company* (1st Cir. 1956) 233 F. 2d 85) in which he had written the earlier opinion. Referring to this earlier case that Court said in effect that the *New Bedford* deci-

sion was not intended to be contrary to the earlier decision (258 F. 2d at 526, 527). In that earlier case Judge Magruder specifically stated that even where the contract in suit puts the matter of arbitrability into the hands of the arbitrator, the Court can give an order requiring arbitration only if "the applicant's claim of arbitrability is not frivolous or patently baseless," 233 F. 2d at 101.

Again, we wish to quote from Professor Cox's long article in the *Harvard Law Review*, Volume 72. At the close of the third from the last paragraph of that article Professor Cox seems to summarize a substantial part of his discussion in two short sentences:

> "* * * Arbitration should be ordered in an action under Section 301 whenever the claim might fairly be said to fall within the scope of the collective-bargaining agreement. If the latter contention be made but is patently frivolous, arbitration should be denied." Cox, "Reflections on Labor Arbitration," 72 *Harv. L. Rev.* 1482, 1516 (1959).

CONCLUSION.

The judgment of the Court of Appeals affirming that of the District Court should here be affirmed.

Respectfully submitted,

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PETITIONER'S REPLY

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No. 443

UNITED STEELWORKERS OF AMERICA, *Petitioner*,

v.

WARRIOR & GULF NAVIGATION COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 538

UNITED STEELWORKERS OF AMERICA, *Petitioner*,

v.

ENTERPRISE WHEEL & CAR CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

I. THE QUESTION IN *AMERICAN MANUFACTURING* AND *WARRIOR & GULF* IS NOT *WHETHER* THE COURT SHOULD DETERMINE IF THERE HAS BEEN A BREACH OF A PROMISE TO ARBITRATE, BUT *HOW* THE COURT SHOULD MAKE THAT DETERMINATION.

In the *Warrior & Gulf* and *American Manufacturing* cases, the companies have devoted a substantial part of their respective briefs to the proposition that a federal court, before ordering arbitration, must determine whether there has been a breach of a promise to arbitrate. Both companies have apparently misconstrued our argument, as set forth in our orig-

inal brief. We do not argue that the federal courts should be "a mere conduit for automatic and mandatory submission of all questions to arbitration" (W.&G. Br., p. 14) or that the court should be "a mere robot to mechanically transfer to arbitrators for determination, all alleged grievances" (Am. Mfg. Br., p. 14). Indeed, we do not even argue, as some authorities have,[1] that a clause requiring arbitration of all disputes involving the interpretation and application of the agreement should be read to include disputes over the interpretation and application of the arbitration clause, itself. Rather, we have accepted the premise, which the majority of lower federal courts have adopted, that the court, and not the arbitrator, must make the determination of whether a particular dispute is "arbitrable" before issuing an order compelling arbitration.

The basic issue in these cases, then, is not whether the court should make that determination, but how it should make it. On this critical issue, the briefs of the companies shed very little light. We are told by the Warrior & Gulf brief that the court should give "due regard to all pertinent factors" (p. 17), and we are told by the American Manufacturing brief that the court should "exercise its valid functions" (p. 14). Both companies devote most of their briefs to arguments which concern exclusively the merits of the particular grievances involved in the respective cases, but neither one tells us why the merits of the grievances are "pertinent" to the question of arbitrability, or why it is a "valid function" of the court to evaluate a grievance when the parties have entrusted that function to an arbitrator.

No purpose would be served by repeating here the reasons set out in our original brief why the federal courts, in deter-

[1] See *Food Handlers Local 425 v. Pluss Poultry, Inc.*, 260 F. 2d 835, 838 (8th Cir. 1958); *Insurance Agents Int'l Union v. Prudential Ins. Co.*, 122 F. Supp. 861 (E. D. Pa., 1954); Gregory, *The Law of the Collective Agreement*, 37 Mich. L. Rev. 635, 648 (1939); Rosenfarb, *The Courts and Arbitration*, N.Y.U. 6th Ann. Conf. on Lab. Law 161, 170-71 (1953); Note, 59 Colum. L. Rev. 153, 172-73 (1959).

mining the arbitrability of a grievance, should avoid passing judgment on the merits of that grievance. We would like, however, to direct this Court's attention to the fact that the National Academy of Arbitrators, the professional association of the labor arbitrators of this country, has officially reported "the firmly held convictions" of its members that "the integrity of free collective bargaining" requires that the agreement to settle by arbitration disputes concerning the rules governing the industrial community be enforced by preventing either party from turning to a different forum than the one agreed upon. In accordance with that view, the Academy has urged the adoption of a federal statute intended to give to the arbitrator the initial jurisdiction to determine arbitrability, and to provide only the most limited review of arbitration awards. We have filed with the Clerk copies of the Academy's proposed statute, as well as its introductory statement. While the proposed statute itself is, of course, immaterial to this case, the views on which the proposal is based as to what the role of the courts in the arbitration process should be, particularly since they are the views of those who are most intimately familiar with the arbitration process, are relevant to the determination of the central issue in these cases.

II. THE COMPANY'S COUNTER STATEMENT OF FACTS IN *WARRIOR & GULF* IS MISLEADING.

In order to keep the record straight, it may be desirable for us briefly to comment on some of the statements made in the Warrior & Gulf Company's counter-statement of facts, even though these statements bear only on the merits of the grievance, and not on the question of whether the grievance is arbitrable. On the top of page 4 of its brief, the company has set out a table showing the amount of contracting out done over the years. In examining this table, it should be borne in mind that the union's grievance did not protest contracting out as such—it protested the contracting out of work which bargaining unit employees could do and had done in

the past. The union repeatedly made this clear in the trial of the case (War. R. 50, 69, 96). Thus, what is important in this controversy is not the total amount of work which the company contracted out, but the proportion of that work which could have been done by its own employees. For example, while the company contracted out $234,000 worth of work in 1954, this included approximately $225,000 for a major non-recurring item, new bottoms, which is not the sort of work which the union claims and which could not be done at the company's terminal (War. R. 86-88).

The company's chart is also misleading in that the 1958 figure, $48,000, represents only nine months of that year (War. R. 86), while the other figures represent a full 12 months. If the 1958 figure were projected for the balance of that year, the amount would be approximately $64,000.

The company asserts that the record does not "bear out" the union's statement that the company had contracted out work which laid off employees could perform and had performed in the past. In fact, the union presented ample evidence to this effect (See War. R. 35-36, 41-42, 44, 48, 50, 56-57), and the company attorney himself stated, "We are not contending that some of the work which we are subcontracting out cannot be done in our yard" (War. R. 53). Indeed, the company's own witness, on direct examination, was asked by the company attorney, "Do you deny that some of the work which is done by companies to which you subcontract is similar or the same as work which is done in your yard?" The answer: "They do work that we are capable of doing. There is no question about it" (War. R. 70).

Finally, the company states that it was the union which first introduced testimony going to the merits of the grievance. This is, of course, true, since the union, as the plaintiff, was obliged to present its case first. But this testimony was introduced only after the court had denied the union's motion to strike from the company's pleadings those allega-

tions which put the merits of the grievance in issue (War. R. 33). Union counsel expressly stated that he was introducing evidence on the merits of the grievance solely because the court, by denying the motion to strike, had permitted the merits of the grievance to remain in issue (War. R. 37-38).

III. NEITHER THE ROLE OF THE COURT UNDER THE STATUTORY GRIEVANCE ADJUSTMENT SYSTEM PROVIDED IN THE RAILWAY LABOR ACT, NOR THE STATUTORY DUTY TO BARGAIN UNDER THE NATIONAL LABOR RELATIONS ACT, IS RELEVANT TO THE ISSUES IN THESE CASES.

On page 11 of its brief, the Warrior & Gulf Company suggests that the role of the court in grievance arbitration should be similar to the role of the court in the grievance adjustment process created by Section 3 of the Railway Labor Act, 45 U.S.C. § 153. As the very case which the company cites makes clear, however, the Railway Labor Act provides a statutory system for adjusting grievances which is quite different from arbitration.

> "If it had been intended that the orders of the [Railroad Adjustment] Board rendered pursuant to 45 U.S.C.A. § 153 should have the effect of awards of arbitrators, some such provisions as are contained in 45 U.S.C.A. §§ 158 and 159 which relate to arbitration under 45 U.S.C.A. § 157, would have been provided for their enforcement. The fact that an entirely different provision was made for the enforcement of Board orders under Section 153 from that made for enforcement of arbitration awards entered under the existing statute relating to arbitration is a matter which cannot be ignored and which shows clearly that Congress did not intend Board orders to have the effect of arbitration awards." *Brotherhood of Ry. Clerks* v. *Atlantic Coast Line R.R.*, 253 F. 2d 753, 757-58 (4th Cir. 1958).

It is plain, therefore, that the Railway Labor Act has no bearing on the present case.

The company also argues that the contractual duty to arbitrate is somehow analogous to the duty to bargain under the National Labor Relations Act. It cites *Jacobs Mfg. Co.*, 94 N.L.R.B. 1214 (1951), *enf'd* 196 F. 2d 680 (2d Cir. 1952) for the proposition that there is no duty to bargain "on subjects of demands made and rejected, as here, in the negotiation of the contract," and thus concludes that it has no duty to arbitrate any grievance involving contracting out of bargaining unit work (p. 12).

This is utterly spurious reasoning. If the *Jacobs* case can be read to hold what the company says it holds, which is in itself dubious, then the case would support the union's position here, not the company's.

The basic issue in *Jacobs* was whether the existence of a collective bargaining agreement precludes any duty to bargain during its term concerning matters which are not explicitly mentioned in it. The controlling provision of the statute was that portion of section 8(d), 29 U.S.C. § 158(d), which states that the duty to bargain does not require any party to discuss "any modification of the terms and conditions contained in a contract for a fixed period." In *Jacobs*, the company had refused, during negotiations under a wage reopener provision, to bargain concerning a pension plan and certain improvements in the insurance program. The insurance improvements had been rejected at the time the agreement had been originally negotiated; the subject of pensions had not previously been discussed.

Two members of the Board held that, in the interest of industrial peace and sound labor relations, the limitation in section 8(d) on the duty to bargain should be strictly construed, and that therefore both subjects, since they were not mentioned in the agreement, were bargainable. Chairman Herzog agreed as to pensions, but held that since the insur-

ance improvements had been discussed and rejected, the failure to include them in the agreement was part of the bargain and therefore should be considered settled for the term of the agreement. Member Reynolds held that the agreement should be construed as embodying all the rights and obligations of the parties for its term, and not subject to any further bargaining except as provided therein. Member Murdock reached the same result as Member Reynolds on the separate ground that the company's only obligation under the wage reopener was to discuss wages. Thus, only one member of the Board, Chairman Herzog held what the company in the present case cites it for—that a matter which had been discussed in negotiations was not subject to a duty to bargain during the term of the agreement—and the ground for this holding was that the agreement impliedly covered that matter.

Chairman Herzog's reasoning, of course, supports our argument here that if the company had the right to contract out, it had that right by virtue of the agreement, and therefore that the question of whether that right exists, and whether it has any limitations, is a question of interpretation and application of the agreement. The position of Member Reynolds in *Jacobs,* that the agreement covers even matters which were not discussed at negotiations, similarly supports the union's position in the present case. As for the opinion of the two members of the Board who held that both issues were bargainable, it does not affect the present case at all. That opinion is not inconsistent with our view that a collective bargaining agreement, particularly when it contains an absolute no strike clause, embodies all the rules governing the employment relationship during its term. What these two Board members held was, simply, that the parties could add to those rules during the term of the agreement, and that the company had an obligation, under the statute, to discuss with the union such proposed additions.

IV. THE COMPANY'S BRIEF IN THE ENTERPRISE CASE IS BASED UPON A FUNDAMENTAL MISCONCEPTION OF THE ISSUES IN THAT CASE.

The Company's argument in the *Enterprise* case does not dispute the well-established proposition, which we set out in our principal brief, that an arbitrator's award is not reviewable on its merits at common law, and should not be reviewable under Section 301. Rather, the company's theory is that the court below properly modified the award in the present case because "the arbitrator exceeded the authority vested in him by the contract." (Ent. Br., p. 32).

The authority of the arbitrator in this case was to render "final and binding" decisions on disputes between the parties which involved "differences . . . as to the meaning and application of the provisions of this Agreement." (Ent.R. 1a-16, 17) Stripped down to its bare bones, the company's argument that the arbitrator exceeded this grant of authority goes something like this: the arbitrator had power only to interpret and apply the agreement; the agreement, properly interpreted, does not provide for reinstatement and back pay beyond the expiration date, even with respect to employees unjustly discharged during the term of the agreement; therefore, the arbitrator's award goes beyond the agreement and is, to that extent unenforceable.

If the company is wrong on the minor premise of this argument—that the agreement did not authorize the remedy which the arbitrator awarded—then, of course, the argument concededly falls. But the question of whether or not the agreement authorized that remedy is, after all, a question as to the meaning of the agreement, and was decided as such by the arbitrator. Thus, the question was one which the arbitrator had jurisdiction to decide and which he has decided, in a decision which the company has agreed shall be "final and binding."

The company's argument, if sustained, would mean that any party which is dissatisfied with an award could challenge that award as being in excess of the "jurisdiction" of the arbitrator because it is based on an incorrect reading of the contract, and therefore beyond the contract. *Cf. Bell* v. *Hood*, 327 U. S. 678 (1946). By this reasoning, the company would limit the jurisdiction of any arbitrator to the rendering of decisions with which a court agrees. We submit that it is the company, not the union, which is here engaging in "bootstrap" logic.

Significantly, the company, while contending that the agreement did not provide for reinstatement and back pay beyond the expiration date, concedes that an agreement *could* so provide. In the company's words,

> "The entire matter is subject to regulation between the parties by their contract. If a union allows a contract to be terminated or does not provide for a contract of longer duration or fails to provide for contingencies, it cannot complain that federal policy favoring arbitration is thwarted. *If additional or continuing rights are desired, the simple solution for the union is to provide in the contract for the disposition of grievances which are pending when the contract expires.*" (p. 19, emphasis added.)

This concession, in our view, fully disposes of this case. The union believed that the contract provided precisely what the company admits it could have provided: full reinstatement to employees unjustly discharged during the term of the agreement, regardless whether the agreement had meanwhile expired. The company disagreed, the matter was submitted to the arbitrator, and he, in the exercise of his authority to interpret the agreement, upheld the union. The company, under the agreement, is obligated to comply with the award, even though it disagrees with it. The court,

therefore, should enforce the award, irrespective of the company's arguments or the court's view as to the correctness of the arbitrator's decision.

The company is able to avoid the obvious circularity in its reasoning by mis-stating the problem. Consistently and repeatedly, the company argues that what was in issue before the arbitrator was "damages for wrongful discharge" (Ent. Br., p. 32). This theme recurs constantly (See, e.g., Ent. Br., pp. 33, 35, 36, 43, 45, 46, 47, 50). Since the employees here were working under a contract which expired on April 4, 1957, the measure of damages for their wrongful discharge, the company argues, is obviously the period for which the contract was written. This is not a question of interpretation and application of the agreement, the company says, but of contract and damage law on which the authorities are clear.

The difficulty with this whole argument, as the district court clearly and correctly held (Ent. R. 1a-9, 10), is that it misconceives the issue. The grievance before the arbitrator was not a request for damages because the company had breached its contract, but was a request that the employer comply with its contract. The law of damages is immaterial because no one has asked for damages. Like Moore, in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630 (1941), the grievants here had the right to challenge the validity of their discharge and seek reinstatement with back pay (although their right derived from the contract rather than the Railway Labor Act). Moore, rather than making such a challenge, "chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract." *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, 244 (1950). The grievants here did not, and any reasoning based on the assumption that their claim must be treated as if it were a claim for damages rests on a wholly erroneous premise.

The distinction between a claim for damages and the kind of grievance presented here is sharply illustrated if we assume that the discharges had taken place at the beginning of a five-year contract. A claim for damages—if one would lie—might be argued to be measured by the term of the agreement, we concede. The claimants might be entitled to only five years wages if they won. But, under the grievance and arbitration procedure of this agreement, and under most collective bargaining agreements, the grievants would be entitled, not to five years' wages, but to reinstatement, with back pay only up to the date of reinstatement.

The fact is that the arbitrator does not, under the usual collective agreement, award damages as such. His function is to interpret the agreement and to find what action by the employer is required, either expressly or impliedly, by that agreement. If he cannot find a remedy expressly or impliedly provided in the agreement, then he cannot award a remedy, even though a court in a similar situation would award damages. Conversely, if the arbitrator finds in the agreement a requirement that the company, when it has violated the agreement, must take certain steps to remedy the violation, he must then issue an award embodying that remedy, notwithstanding the fact that the remedy might go beyond what the law of damages might provide in a similar situation.

Let us suppose, for example, that an employer violates certain safety requirements set forth in a collective bargaining agreement, and as a result an employee is injured. Could an arbitrator award damages to the injured employee, in the amount of his medical and hospital bills, his lost earnings and or earning power, his pain and suffering, etc.? An employer in this situation would undoubtedly urge, and we think correctly, that the arbitrator has the power only to interpret and apply the agreement, and not to interpret

and apply the law of damages. Thus, the arbitrator would interpret, and require the company to comply with, the safety provisions, and any other relevant provisions of the agreement, but the question of the employee's right to damages, if any, would not be a question within his jurisdiction. Similarly, the arbitrator in this case interpreted the agreement, and required the company to take action which, in the arbitrator's view, the agreement, not the law, required the company to take.

Once this distinction, so clearly indicated by the *Slocum* case, *supra,* is understood, both the company's entire argument and any possible difficulty in the case, disappear. The agreement provides that an employee unjustly discharged shall be reinstated. The grievants had that right when they were discharged. The employer's delay in complying with his obligation to reinstate them cannot erase that obligation. Having arisen during the contract term it continued until complied with. It was neither enlarged nor diminished by the expiration of the agreement. If the agreement had provided—as it did not—for damages rather than reinstatement with back pay, that obligation, too, would have vested at the time of the discharge and would not have been enlarged or diminished by subsequent events. The difference is that, in the case of a claim for damages the employee's right, from the beginning, would have been to receive damages measured by the termination date of the agreement. In the case of a grievance asking that the discharge be set aside, the employee's right, from the beginning, is that specified in the agreement: reinstatement with back pay.

The decision of the arbitrator in this case, therefore, was not only within his jurisdiction, it was plainly right, except perhaps as it provided for deductions from the absolute requirement in the contract for back pay. But, right or wrong,

the decision was one for the arbitrator to make and, once it was made, it was "final and binding" upon the parties.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 360.—October Term, 1959.

United Steelworkers of America, Petitioner, v. American Manufacturing Co.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June 20, 1960.]

Mr. Justice Douglas delivered the opinion of the Court.

This suit was brought by petitioner union in the District Court to compel arbitration of a "grievance" that petitioner, acting for one Sparks, a union member, had filed with the respondent, Sparks' employer. The employer defended on the ground (1) that Sparks is estopped from making his claim because he had a few days previously settled a workmen's compensation claim against the company on the basis that he was permanently partially disabled, (2) that Sparks is not physically able to do the work, and (3) that this type of dispute is not arbitrable under the collective bargaining agreement in question.

The agreement provided that during its term there would be "no strike," unless the employer refused to abide by a decision of the arbitrator. The agreement sets out a detailed grievance procedure with a provision for arbitration (regarded as the standard form) of all disputes between the parties "as to the meaning, interpretation and application of the provisions of this agreement."[1]

[1] The relevant arbitration provisions read as follows:

"Any disputes, misunderstandings, differences or grievances arising between the parties as to the meaning, interpretation and application

The agreement also reserves to the management power to suspend or discharge any employee "for cause." [2] It also contains a provision that the employer will employ and promote employees on the principle of seniority "where ability and efficiency are equal." [3] Sparks left his work due to an injury and while off work brought an action for compensation benefits. The case was settled. Sparks' physician expressing the opinion that the injury had made him 25% permanently partially disabled. That was on September 9. Two weeks later the union

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of the provisions of this agreement, which are not adjusted as herein provided, may be submitted to the Board of Arbitration for decision. . . .

"The arbitrator may interpret this agreement and apply it to the particular case under consideration but shall, however, have no authority to add to, subtract from, or modify the terms of the agreement. Disputes relating to discharges or such matters as might involve a loss of pay for employees may carry an award of back pay in whole or in part as may be determined by the Board of Arbitration.

"The decision of the Board of Arbitration shall be final and conclusively binding upon both parties, and the parties agree to observe and abide by same. . . ."

[2] "The Management of the works, the direction of the working force, plant layout and routine of work, including the right to hire, suspend, transfer, discharge or otherwise discipline any employee for cause, such cause being: infraction of company rules, inefficiency, insubordination, contagious disease harmful to others, and any other ground or reason that would tend to reduce or impair the efficiency of plant operation; and to lay off employees because of lack of work, is reserved to the Company, provided it does not conflict with this agreement. . . ."

[3] This provision provides in relevant part:

"The Company and the Union fully recognize the principle of seniority as a factor in the selection of employees for promotion, transfer, lay-off, re-employment, and filling of vacancies, where ability and efficiency are equal. It is the policy of the Company to promote employees on that basis."

filed a grievance which charged that Sparks was entitled to return to his job by virtue of the seniority provision of the collective bargaining agreement. Respondent refused to arbitrate and this action was brought. The District Court held that Sparks, having accepted the settlement on the basis of permanent partial disability was estopped to claim any seniority or employment rights and granted the motion for summary judgment. The Court of Appeals affirmed, 264 F. 2d 624, for different reasons. After reviewing the evidence it held that the grievance is "a frivolous, patently baseless one, not subject to arbitration under the collective bargaining agreement." *Id.*, at 628. The case is here on a writ of certiorari, 361 U. S. 881.

Section 203 (d) of the Labor Management Relations Act, 1947, 61 Stat. 154, 29 U. S. C. § 173 (d) states, "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. . . ." That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play.

A state decision that held to the contrary announced a principle that could only have a crippling effect on grievance arbitration. The case was *International Assn. of Machinists* v. *Cutler-Hammer, Inc.*, 271 App. Div. 917, aff'd 297 N. Y. 519. It held that "If the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration." 271 App. Div., at 918. The lower courts in the instant case had a like preoccupattion with ordinary contract law. The collective agreement requires arbitration of claims that courts might be unwilling to entertain. Yet in the

context of the plant or industry the grievance may assume proportions of which judges are ignorant. Moreover, the agreement is to submit all grievances to arbitration, not merely those that a court may deem to be meritorious. There is no exception in the "no strike" clause and none therefore should be read into the grievance clause, since one is the *quid pro quo* for the other.[4] The question is not whether in the mind of a court there is equity in the claim. Arbitration is a stabilizing influence only as it serves as a vehicle for handling every and all disputes that arise under the agreement.

The collective agreement calls for the submission of grievances in the categories which it describes irrespective of whether a court may deem them to be meritorious. In our role of developing a meaningful body of law to govern the interpretatiton and enforcement of collective bargaining agreements, we think special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve. See *Lewis* v. *Benedict Coal Corp.*, 361 U. S. 459, 468. The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is then confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.

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[4] Cf. *Structural Steel & Ornament Assn.* v. *Shopmen's Local Union*, 172 F. Supp. 354, where the employer sued for breach of the "no strike" agreement.

The courts therefore have no business weighing the merits of the grievance,[5] considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those the court will deem meritorious. The processing of even frivolous claims may have therapeutic values which those who are not a part of the plant environment may be quite unaware.[6]

The union claimed in this case that the company had violated a specific provision of the contract. The company took the position that it had not violated that clause. There was, therefore, a dispute between the parties as to "the meaning, interpretation and application" of the collective bargaining agreement. Arbitration should have been ordered. When the judiciary undertakes to deter-

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[5] See *New Bedford Defense Products Division* v. *Local No. 1113*, 258 F. 2d 522, 526 (C. A. 1st Cir.).

[6] Cox, Current Problems in the Law of Grievance Arbitration, 30 Rocky Mt. L. Rev. 247, 261 (1958), writes:

"The typical arbitration clause is written in words which cover, without limitation, all disputes concerning the interpretation or application of a collective bargaining agreement. Its words do not restrict its scope to meritorious disputes or two-sided disputes, still less are they limited to disputes which a judge will consider two-sided. Frivolous cases are often taken, and are expected to be taken, to arbitration. What one man considers frivolous another may find meritorious, and it is common knowledge in industrial relations circles that grievance arbitration often serves as a safety valve for troublesome complaints. Under these circumstances it seems proper to read the typical arbitration clause as a promise to arbitrate every claim, meritorious or frivolous, which the complainant bases upon the contract. The objection that equity will not order a party to do a useless act is outweighed by the cathartic value of arbitrating even a frivolous grievance and by the dangers of excessive judicial intervention."

mine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal.

Reversed.

MR. JUSTICE FRANKFURTER concurs in the result.

MR. JUSTICE WHITTAKER, believing that the District Court lacked jurisdiction to determine the merits of the claim which the parties had validly agreed to submit to the exclusive jurisdiction of a Board of Arbitrators (*Textile Workers* v. *Lincoln Mills*, 353 U. S. 448), concurs in the result of this opinion.

MR. JUSTICE BLACK took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

Nos. 360, 443 AND 538.—OCTOBER TERM, 1959.

360	United Steelworkers of America, Petitioner, v. American Manufacturing Co.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.
443	United Steelworkers of America, Petitioner, v. Warrior and Gulf Navigation Company.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
538	United Steelworkers of America, Petitioner, v. Enterprise Wheel and Car Corp.	On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[June 20, 1960.]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE HARLAN joins, concurring.

While I join the Court's opinions in Nos. 443, 360 and 538, I add a word in Nos. 443 and 360.

In each of these two cases the issue concerns the enforcement of but one promise—the promise to arbitrate in the context of an agreement dealing with a particular subject matter, the industrial relations between employers and employees. Other promises contained in the collective bargaining agreements are beside the point unless, by the very terms of the arbitration promise, they are made relevant to its interpretation. And I emphasize this, for the arbitration promise is itself a contract. The parties are free to make that promise as broad or as narrow as they wish for there is no compulsion in law requiring them

to include any such promises in their agreement. The meaning of the arbitration promise is not to be found simply by reference to the dictionary definitions of the words the parties use, or by reference to the interpretation of commercial arbitration clauses. Words in a collective bargaining agreement, rightly viewed by the Court to be the charter instrument of a system of industrial self-government, like words in a statute, are to be understood only by reference to the background which gave rise to their inclusion. The Court therefore avoids the prescription of inflexible rules for the enforcement of arbitration promises. Guidance is given by identifying the various considerations which a court should take into account when construing a particular clause—considerations of the milieu in which the clause is negotiated and of the national labor policy. It is particularly underscored that the arbitral process in collective bargaining presupposes that the parties wanted the informed judgment of an arbitrator, precisely for the reason that judges cannot provide it. Therefore, a court asked to enforce a promise to arbitrate should ordinarily refrain from involving itself in the interpretation of the substantive provisions of the contract.

To be sure, since arbitration is a creature of contract, a court must always inquire, when a party seeks to invoke its aid to force a reluctant party to the arbitration table, whether the parties have agreed to arbitrate the particular dispute. In this sense, the question of whether a dispute is "arbitrable" is inescapably for the court.

On examining the arbitration clause, the court may conclude that it commits to arbitration any "dispute, difference, disagreement, or controversy of any nature or character." With that finding the court will have exhausted its function, except to order the reluctant party to arbitration. Similarly, although the arbitrator may

be empowered only to interpret and apply the contract the parties may have provided that any dispute as to whether a particular claim is within the arbitration clause is itself for the arbitrator. Again the court, without more, must send any dispute to the arbitrator, for the parties have agreed that the construction of the arbitration promise itself is for the arbitrator, and the reluctant party has breached his promise by refusing to submit the dispute to arbitration.

In *American*, the Court deals with a request to enforce the "standard" form of arbitration clause, one that provides for the arbitration of "any disputes, misunderstandings, differences or grievances arising between the parties as to the meaning, interpretation and application of this agreement. . . ." Since the arbitration clause itself is part of the agreement, it might be argued that a dispute as to the meaning of that clause is for the arbitrator. But the Court rejects this position, saying that the threshold question, the meaning of the arbitration clause itself, is for the judge unless the parties clearly state to the contrary. However, the Court finds that the meaning of that "standard" clause is simply that the parties have agreed to arbitrate any dispute which the moving party asserts to involve construction of the substantive provisions of the contract, because such a dispute necessarily does involve such a construction.

The issue in the *Warrior* case is essentially no different from that in *American*, that is, it is whether the company agreed to arbitrate a particular grievance. In contrast to *American*, however, the arbitration promise here excludes a particular area from arbitration—"matters which are strictly a function of management." Because the arbitration promise is different, the scope of the court's inquiry may be broader. Here, a court may be required to examine the substantive provisions of the contract to

ascertain whether the parties have provided that contracting out shall be a "function of management." If a court may delve into the merits to the extent of inquiring whether the parties have expressly agreed whether or not contracting out was a "function of management," why was it error for the lower court here to evaluate the evidence of bargaining history for the same purpose? Neat logical distinctions do not provide the answer. The Court rightly concludes that appropriate regard for the national labor policy and the special factors relevant to the labor arbitral process, admonish that judicial inquiry into the merits of this grievance should be limited to the search for an explicit provision which brings the grievance under the cover of the exclusion clause since "the exclusion clause is vague and arbitration clause quite broad." The hazard of going further into the merits is amply demonstrated by what the courts below did. On the basis of inconclusive evidence, those courts found that *Warrior* was in no way limited by any implied covenants of good faith and fair dealing from contracting out as it pleased—which would necessarily mean that *Warrior* was free completely to destroy the collective bargaining agreement by contracting out all the work.

The very ambiguity of the *Warrior* exclusion clause suggests that the parties were generally more concerned with having an arbitrator render decisions as to the meaning of the contract than they were in restricting the arbitrator's jurisdiction. The case might of course be otherwise were the arbitration clause very narrow, or the exclusion clause quite specific, for the inference might then be permissible that the parties had manifested a greater interest in confining the arbitrator; the presumption of arbitrability would then not have the same force and the Court would be somewhat freer to examine into the merits.

The Court makes reference to an arbitration clause being the *quid pro quo* for a no-strike clause. I do not understand the Court to mean that the application of the principles announced today depends upon the presence of a no-strike clause in the agreement.

MR. JUSTICE FRANKFURTER joins these observations.